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No. 88-368

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

THOMAS G. KOCH,
Petitioner,
Versus
CITY OF HUTCHINSON, KANSAS, ET AL.,
Respondents.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

ADDITIONAL REASONS FOR ALLOWANCE OF THE WRIT 2

1. Petitioner's Claim That Respondents Waived The Pickering Balance Is Not Untimely. 2

2. The Courts' Appellate Review Does Have Limitations. 5

3. The Speech Itself--Not Non-Speech Conduct--Must Be Disruptive For Pickering To Apply. 12

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT OPINIONS

Pennekamp v. Florida, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946) 7

Rankin v. McPherson, 107 S.Ct. 2891, 2897 (1987) 5

Rowland v. Mad River Local School Dist., 105 S.Ct. 1373 (1985) ... 7

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Petitioner submits the following reply brief, pursuant to Rule 22.5. Petitioner incorporates the factual statement, jurisdiction statement, and reasons for allowance of the writ set out in his petition. As additional **REASONS FOR ALLOWANCE OF THE WRIT** petitioner submits the following responsive points.

1. Petitioner's Claim That Respondents Waived The Pickering Balance Is Not Untimely.

Respondents suggest that petitioner has waived the right to challenge the *en banc* majority's opinion because it purported to conduct the *Pickering* balancing. Petitioner challenges that ruling, in part, because respondents never properly or timely raised a claim that the nature of petitioner's

speech, in context, was inherently disruptive. Instead, the record reflects that respondents *denied* that petitioner's speech had anything to do with his demotion. And, respondents maintained that position *until* the jury rejected the claimed reason for the demotion. Then, for the first time, respondents claimed that the *speech* was disruptive, and that they were entitled to a *Pickering* balance. The trial court never reached the issue in its post-trial rulings because it found that the speech was not on a matter of public concern and hence not protected. The original panel of the Tenth Circuit did not address the *Pickering* balance. When *en banc* review was granted, it was granted *only* on the question of whether the speech was on a matter of public concern. (See Petition, Appendix "B".)

Thus, it was not until the *en banc* opinion was issued that the *Pickering* balancing was conducted. *A fortiori* petitioner could not have raised it before then. And, as a matter of fact, during oral argument *en banc*, counsel for petitioner vigorously opposed any such balancing (in light of the brief and argument of respondents *en banc* which indicated that respondents were urging the *Pickering* balancing). It is sheer sophistry to suggest, on this record, that petitioner should have--or indeed, could have--raised an objection to the balancing done by the *en banc* majority before the petition with this Court.

2. The Courts' Appellate Review Does Have Limitations.

Petitioner contends that the *en banc* majority erred in retrying the facts earlier tried by a jury. Respondents answer by suggesting that there is no limit on any appellate court in a First Amendment public employment case in reviewing the record. Respondents base this assertion on language by this Court indicating a duty to examine the statements and issue and circumstances under which they were made to insure that they "are of a character which the principles of the First Amendment ... protect". *E.g., Rankin v. McPherson*, 107 S.Ct. 2891, 2897 (1987).

Petitioner submits that notwithstanding this duty by appellate courts, there is a

limitation on review. Certainly this Court has never intended to hold that a jury verdict on underlying facts in First Amendment cases should be completely disregarded by an appellate court. That is the conclusion that respondents urge. The language of this Court indicates that there is a limitation on review. Thus, for instance, in *Rankin*, this court stated:

> Our view of these determinations [that the speech was or was not a matter of public concern] *is limited in this context* by our constitutional obligation to assure *that the record supports this conclusion*: "'we are compelled to examine for ourselves the statements in issue and the circumstances under which they [were] made to see whether or not they ... are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'" *Connick, supra*, 461 U.S., at 150, n. 10, 103 S.Ct., at 1692, n. 10, quoting *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90

> L.Ed. 1295 (1946) (footnote omitted).

107 S.Ct. at 2897; emphasis added. Thus, even though the inquiry is whether the speech is protected, or whether the statements are the type to be protected by the First Amendment, the level of review does not appear to be different from that level allowed or appropriate on any other appeal. In other words, the only inquiry is whether there is record support for the conclusion reached at the trial court level. This does not appear to obligate or entitle an appellate court to completely retry facts determined by a jury.

In *Rowland v. Mad River Local School Dist.*, 105 S.Ct. 1373 (1985), in a dissenting opinion where a petition for writ of certiorari was denied, Justice Brennan,

joined by Justice Marshall, suggested that a limitation existed when an appellate court reviewed a First Amendment case. In that case a public high school employee was fired because she was a homosexual who revealed her sexual preference. A jury found that she was punished because she was bisexual and told her secretary and some fellow teachers that she was bisexual, and not for "any other reason". 105 S.Ct. at 1374. The jury also found that her mention of her bisexuality did not in any way interfere with petitioner's performance of her duties or with the operation of the school generally. Upon the jury's verdict, the trial judge entered judgment. The Sixth Circuit reversed, finding in part that the speech was not a matter of public concern. Justices Brennan and Marshall of this Court

criticized that holding, stating:

> Petitioner did not lose her job because she disrupted the school environment or failed to perform her job. She was discharged merely because she is bisexual and revealed this fact to acquaintances at her work place. *These facts are rendered completely unambiguous by the jury's findings. Yet after a jury and the trial court who heard and evaluated the evidence rendered verdicts for petitioner, the court below reversed* based on a crabbed reading of our precedents *and unexplained disregard of the jury and judge's factual findings.* Because they are so patently erroneous, these manuevers suggest only a desire to evade the central question: may a State dismiss a public employee based on her bisexual status alone? I respectfully dissent from the Court's decision not to give its plenary attention to this issue.

105 S.Ct. at 1375; emphasis added. Thus, it appears that at least two members of this Court consider a disregard of findings of the jury to be "patently erroneous".

Respondents suggestion that appellate review can include a complete retrying and reweighing of facts should be rejected by this Court.

Respondents treat the issue as though they are still arguing their case to a jury. For instance, in their brief in opposition, respondents make arguments to the effect that petitioner is not entitled to immunity in non-speech misconduct just because he engages in speech otherwise that may be protected. The question before this Court is not whether or not petitioner misconducted himself on the job. The question before this Court is whether, in the name of conducting the constitutional review of the record to insure that the speech is the type to be protected, an appellate court can retry the facts, and in

this case disregard the jury's finding that Koch did not engage in misconduct on the job as respondents alleged throughout the trial, and indeed throughout this case.

Respondents contend that the jury did not decide the disruptiveness issue. Of course, no one decided the disruptiveness issue under *Pickering* before trial, because respondents did not raise it. However, that conduct which respondents have alleged was disruptive by Koch--that is his non-speech conduct--most certainly was decided by the jury under the *Mount Healthy* "but for" phase of the case. Clearly through the trial respondents contended that Koch's demotion resulted from his misconduct which respondents contended was disruptive and created disharmony. Just as clearly, in finding that Koch would not have been

demoted "but for" his speech in his arson report, the jury rejected those contentions by respondents. Now, the *en banc* majority has ignored that rejection by the jury, and has accepted respondents' contentions that non-speech conduct was disruptive, and on the weight of that acceptance has found that under *Pickering* the balance tips in respondents' favor as though it were his speech that was disruptive.

3. The Speech Itself--Not Non-Speech Conduct--Must Be Disruptive For Pickering To Apply.

In their opposition brief, respondents suggest that petitioner is asking the Court to consider the speech in a vacuum. Respondents treat petitioner's position as though petitioner is saying that the speech

must be disruptive out of context and *per se*. This is not petitioner's position. Petitioner fully recognizes that the speech must be considered in its full context in order to answer the questions of (a) whether the speech is on a matter of public concern and (b) whether the speech is inherently disruptive. But, petitioner does contend that it must be the *speech* that is disruptive; and, *Pickering* does not apply if either (a) non-speech conduct is alleged to have been disruptive or (b) a hostile or antagonistic reaction of persons who do not like the speech, to the speech, causes disruption. Placing respondents' factual contentions in the absolute best light for them, the most they can claim is that disruption arose when the county attorney and others did not like Koch's speech, and

had an adverse reaction to it. It cannot be suggested that the speech here was of a nature that it inherently disrupted Koch's relationship with his superiors and other agencies or interfered with Koch's duties. This Court has held, in *Rankin*, and in *Pickering*, that the necessary disruption to render the speech unprotected cannot be the disruption that arises because persons hearing the speech do not like the speech and reacts in an adverse or disruptive fashion.

In this Court's most recent statement on the *Pickering* issue, the Court made it clear that it is the speech itself which must be disruptive. In *Rankin*, in its discussion of the *Pickering* balancing, for instance, this Court stated that "*Pickering* next requires that we balance McPherson's

interest *in making her statement* against 'the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.'" 107 S.Ct. at 2898; emphasis added. And this Court said that "[w]hile McPherson's *statement* was made at the work place, there is no evidence that *it* interfered with the efficient running of the office." 107 S.Ct. at 2899; emphasis added. And the Court stated:

> Nor was there any danger that McPherson had discredited the office by making her *statement* in public. McPherson's *speech* took place in an area to which there was ordinarily no public access; *her remark* was evidently made in a private conversation with another employee. There is no suggestion that any member of the general public was present or heard McPherson's *statement*. Nor is there any evidence that employees other than Jackson who worked in the room even heard the *remark*. Not only was McPherson's

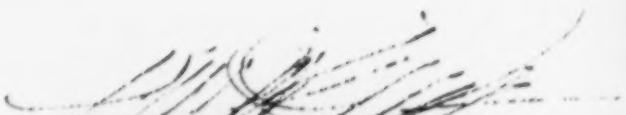
> discharge unrelated to the functioning of the office, it was not based on any assessment by the constable that the *remark* demonstrated a character trait that made respondent unfit to perform her work.

Id.; emphasis added. It is clear that this court makes a distinction between speech which is inherently disruptive in context, on the one hand, and non-speech conduct which may justify adverse employment actions. It is the statement or speech itself which must, in context, be inherently disruptive. That claim was not made here and that claim is not supportable here.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing **PETITIONER'S REPLY BRIEF** have been served upon the

following counsel of record by placing same in the United States Mail, properly addressed and postage prepaid, on the 10th day of October, 1988: Mr. Robert L. Howard, Esq., 700 Fourth Financial Center, Wichita, Kansas 67202; Mr. Philip H. Alexander, Esq., Post Office Box 1567, 125 E. Ave. B, Hutchinson, Kansas 67501; and, Mr. James M. Kaup, Esq., General Counsel, League of Kansas Municipalities, 112 W. 7th St., Topeka, Kansas 66603.



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